April 11, 2022

Via Electronic Filing

Ms. Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Modernization of Beneficial Ownership Reporting (SEC Rel. Nos. 33-11030; 34-94211; File No. S7-06-22)

Dear Ms. Countryman:

The Investment Adviser Association (**IAA**)[1] appreciates the opportunity to comment on the Commission's proposed rules to modernize beneficial ownership reporting under Sections 13(d) and 13(g) of the Securities Exchange Act of 1934 (**Exchange Act**).[2] The Proposal represents the first significant changes to the rules in decades.

The beneficial ownership reporting requirements under Section 13(d) are intended to provide "timely disclosures needed for informed investment decisions." Currently, any person who directly or indirectly, *i.e.*, through a group, acquires beneficial ownership of more than 5 percent of the voting equity securities of a public issuer must file a Schedule 13D with the SEC within 10 calendar days of the acquisition. In some circumstances, the person or group may be eligible to file a more abbreviated Schedule 13G instead. The Section 13(g) requirements are intended to provide a "comprehensive disclosure system of corporate ownership" for these beneficial owners. The Schedule 13G currently must be filed within 45 calendar days after the calendar year end in which the acquisition occurred (or within 10 calendar days of the acquisition for certain filers). Both Schedules 13D and 13G must be amended following certain triggering events.

The Commission proposes, among other changes, to:

[1] The IAA is the leading organization dedicated to advancing the interests of investment advisers. For more than 80 years, the IAA has been advocating for advisers before Congress and U.S. and global regulators, promoting best practices and providing education and resources to empower advisers to effectively serve their clients, the capital markets, and the U.S. economy. The IAA's member firms manage more than $35 trillion in assets for a wide variety of individual and institutional clients, including pension plans, trusts, mutual funds, private funds, endowments, foundations, and corporations. For more information, please visit www.investmentadviser.org.

[2] *Modernization of Beneficial Ownership Reporting*, 87 Fed. Reg. 13846 (Mar. 10, 2022), available at https://www.govinfo.gov/content/pkg/FR-2022-03-10/pdf/2022-03222.pdf (**Proposal**).

- Accelerate the filing deadlines for Schedules 13D and 13G beneficial ownership reports.
- Expand the application of Regulation 13D-G to cash-settled derivative securities.
- Clarify the circumstances under which two or more persons have formed a group subject to reporting requirements.
- Require filing using a structured, machine-readable data language.

We commend the Commission for its efforts to modernize these reporting requirements and support the Commission's goal of increased transparency. We make substantive recommendations that we believe will better balance the goals of transparency and limiting regulatory burdens and unintended consequences.[3]

[3] The Proposal is one of several concurrent rule proposals that, if adopted, will have an enormous effect on investment advisers, investors, the markets, and the U.S. financial system as a whole. Each of these proposals, standing alone, is complex and potentially consequential, with the accompanying releases asking a large number of questions and seeking a large amount of data. Given the significant amendments proposed, we continue to be concerned that the very short comment period – for this and all the other proposals – is insufficient for us and other commenters to provide comprehensive and sufficiently thorough responses, including "any supporting documentation or data." Proposal at 13849.

As we recently expressed, we do not believe the SEC has provided sufficient time for considered public input on the Proposal; a comment period for *this* Proposal of *at least* 60 days from publication in the *Federal Register* would have been more appropriate. *See* IAA and Joint Trade Associations' Letter on Importance of Appropriate Length of Comment Periods (Apr. 5, 2022), available at https://investmentadviser.org/resources/iaa-and-trade-associations-urge-sec-to-lengthen-short-comment-periods/ and IAA and Joint Trade Associations' Letter Requesting Extension of Comment Period for Private Fund, Form PF Proposals (Mar. 1, 2022), available at https://investmentadviser.org/wp-content/uploads/2022/03/Extension-Request-File-Nos.-S7-03-22-S7-01-22.pdf. We strongly urge the Commission to formally extend the comment period in order to undertake a more quantifiable assessment of the costs the Proposal would impose on investment advisers.

Some of the other significant rule proposals concurrently or recently out for comment are: *Cybersecurity Risk Management for Investment Advisers, Registered Investment Companies, and Business Development Companies*, 87 Fed. Reg. 13524 (Mar. 9, 2022), available at https://www.govinfo.gov/content/pkg/FR-2022-03-09/pdf/2022-03145.pdf (**Adviser Cybersecurity Proposal**), *Amendments to Form PF To Require Current Reporting and Amend Reporting Requirements for Large Private Equity Advisers and Large Liquidity Fund Advisers*, 87 Fed. Reg. 9106 (Feb. 17, 2022), available at https://www.govinfo.gov/content/pkg/FR-2022-02-17/pdf/2022-01976.pdf (**Form PF Proposal**), *Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews*, 87 Fed. Reg. 16886 (Mar. 24, 2022), available at https://www.govinfo.gov/content/pkg/FR-2022-03-24/pdf/2022-03212.pdf, *Shortening the Securities Transaction Settlement Cycle*, 87 Fed. Reg. 10436 (Feb. 24, 2022), available at https://www.govinfo.gov/content/pkg/FR-2022-02-24/pdf/2022-03143.pdf (**T+1 Proposal**), *Short Position and Short Activity Reporting by Institutional Investment Managers; Notice of Proposed Amendments to the National Market System Plan Governing the Consolidated Audit Trail for Purposes of Short Sale-related Data Collection*, 87 Fed. Reg. 14950 (Mar. 16, 2022), available at https://www.govinfo.gov/content/pkg/FR-2022-03-16/pdf/2022-04670.pdf (**Short Position Proposal**), *Money Market Fund Reforms*, 87 Fed. Reg. 7248 (Feb. 8, 2022), available at https://www.govinfo.gov/content/pkg/FR-2022-02-08/pdf/2021-27532.pdf, *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 87 Fed. Reg. 21334 (Apr. 11, 2022), available at https://www.govinfo.gov/content/pkg/FR-2022-04-11/pdf/2022-06342.pdf, *Further Definition of "As a Part of a Regular Business" in the Definition of Dealer and Government Securities Dealer*, Rel. No. 34-94524 (Mar. 28, 2022), available at https://www.sec.gov/rules/proposed/2022/34-94524.pdf, *Special Purpose Acquisition Companies, Shell Companies, and Projections*, Rel. Nos. 33-11048; 34-94546; IC-34549 (Mar. 30, 2022), available

Executive Summary

- We agree that the beneficial ownership rules are in need of modernization. We have a number of concerns, however, with the proposed updates and premises underlying the changes and make specific recommendations to address these concerns. We believe that the accelerated timelines pose operational challenges and do not provide sufficient time for accurate and complete reporting. The short deadlines may also exacerbate free riding and front running. Accordingly, we make specific recommendations to change the proposed filing schedule to provide filers with sufficient time, create consistency, and reduce unnecessary confusion, as summarized in **Appendix A**.

- We oppose deeming holders of certain cash-settled derivative securities to beneficially own the reference securities just as if they held such securities directly. This treatment of cash-settled derivatives is unnecessary, unclear, and inconsistent with the purpose behind the beneficial ownership reporting regime. It would also be inconsistent with the proposed security-based swap reporting regime to require disclosure of security-based swap arrangements in Item 6 of Schedule D.

- We have significant concerns that the proposed definition of a group is overbroad and could chill shareholder engagement. The Commission should reconsider the proposed definition to avoid inadvertent group formation, and set forth clearer parameters on what constitutes a group, such as an express or implied contract or agreement. The Commission should also extend the proposed exemptions from being deemed a group to other common communications.

- We support using 13D/G-specific XML to file Schedules 13D and 13G, provided that filers are given sufficient time to implement and test the systems requirements.

- It would not be appropriate to apply the standards of Regulation 13D-G to identify 10 percent holders subject to Exchange Act Section 16 due to potential Section 16(b) short-swing profit liability.

I. Filing Deadlines

The Commission is proposing to significantly shorten the filing deadlines for initial and amended Schedules 13D and 13G.[4] As an initial matter, with so many filing deadlines and permutations, we recommend consistently using either calendar days (expressed as "days") or

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at https://www.sec.gov/rules/proposed/2022/33-11048.pdf, and *Prohibition Against Fraud, Manipulation, or Deception in Connection with Security-Based Swaps; Prohibition against Undue Influence over Chief Compliance Officers; Position Reporting of Large Security-Based Swap Positions*, 87 Fed. Reg. 6652 (Feb. 4, 2022), available at https://www.govinfo.gov/content/pkg/FR-2022-02-04/pdf/2021-27531.pdf (**Security-Based Swaps Proposal**).

[4] Proposal at 13847.

business days across *all* of the Schedule 13D and 13G initial and amendment filing deadlines, where the deadlines are less than 45 days. This would promote compliance by making it simpler and less confusing to keep track of the various deadlines. We strongly recommend using business days in order to give filers sufficient time to analyze and prepare Schedules 13D and 13G and make it more likely that the Commission, issuers, and the marketplace will receive beneficial ownership information that is accurate and complete.[5] We do not believe the use of business days instead of calendar days when establishing the filing deadlines will have a detrimental impact on the proposed benefits of shorter deadlines.

More fundamentally, we disagree with the Proposal's premise that technological advances support *significantly* reducing the filing periods. Despite advances in technology, the filing process still has numerous operational components that take time to complete. From a logistical perspective, if the reporting deadlines for Schedules 13D and 13G are drastically shortened, many investment advisers would have difficulty complying in practice. For example, some trades that are made on the last day of a month are not cleared right away.[6] Much, but not all, securities-holdings data is automated and reconciled daily. However, it still takes at least a few business days to achieve final, reconciled accounts. Some securities-holdings data does not have any or have limited automated reporting capabilities, such as positions held directly with a company or transfer agent rather than held with a traditional custodian or broker-dealer. Schedule 13D and 13G reporting also cannot be accomplished with a mere push of a button; rather, some processing and nuanced legal analysis are required.[7]

Schedule 13D, in particular, requires drafting individual investment-specific disclosures, and as discussed below and particularly under the proposed changes, may require complex calculations and analysis to determine reportable information. In addition, the complexity of the investment management industry has greatly increased over time, adding to the complexity of filing Schedule 13G. Many investment advisers reside within larger financial services organizations. Different affiliates within the same organization may hold the same securities. Those organizations need sufficient time to identify, consolidate, and reconcile the data.

For investment advisory firms that conduct operations internationally, significantly shortening the filing deadlines would make filing even more difficult in practice due to delays necessitated by different time zones. If the adviser has even one affiliate that is not on a common investment-reporting platform or is not located in the United States, it would not be easy to

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[5] For example, we do not believe that, if a triggering event occurs on a Thursday, it is reasonable to expect filers to be able to adequately complete all the steps necessary to make a reliable filing by the following Tuesday. In addition, streamlining the various deadlines would make compliance easier.

[6] Under the Commission's recent proposal to shorten the standard settlement cycle for most broker-dealer transactions from two business days after the trade date to one business day after the trade date (**T+1**), most trades would be cleared on the trade date or early T+1. *See* T+1 Proposal.

[7] While, as discussed below, we do not object to shortening the initial Schedule 13D filing deadline (although we recommend using business days), doing so is not without significant costs to filers. In addition to the operational challenges of collecting the information in a shorter time, there will be other unintended consequences. For example, investors that are executing a block trade in a less liquid equity security could potentially need to file an amendment almost immediately after filing the initial Schedule 13D because the filer may need several days to acquire the shares even after triggering the 5 percent threshold.

complete the process within the proposed time. For example, an investment advisory firm's reporting process could involve receiving spreadsheets from multiple affiliates, consolidating those spreadsheets into one report, reviewing the consolidated report for errors and discrepancies, following up to correct issues, calculating beneficial ownership, preparing Schedule 13D or 13G – and obtaining review by outside counsel when necessary, and obtaining signatures (including from group members if needed).

We make specific recommendations below on each filing type that we believe will better accommodate these operational challenges and compliance burdens, without impinging on the public benefit of timely disclosure.

i. Schedule 13D initial filings should be due in five business days rather than the proposed five calendar days.

The Proposal would shorten the filing deadline for the initial Schedule 13D from 10 to **five calendar days** after (i) the date on which a person acquires more than 5 percent of a covered class of equity securities[8] or (ii) the event that causes certain persons to forfeit their eligibility to report on Schedule 13G in lieu of Schedule 13D.[9]

We believe that five calendar days should be revised to five business days. As described above, it will be extremely challenging for filers to obtain and verify all the information needed to ensure the accuracy and completeness of a Schedule 13D filing in the time proposed. While still very short, we believe this change will provide filers with a more reasonable amount of time to collect and calculate the needed information and carefully prepare the filing.

ii. Schedule 13D amendments should be due within two business days rather than the proposed one business day.

The Proposal would shorten the filing deadline for amendments to Schedule 13D from promptly after the triggering event (a **material change**) to **one business day** after that event.[10] We believe that a one business-day deadline would be too aggressive from an operational perspective, and that it would be extremely difficult for filers to comply. We recommend extending this proposed deadline to **two business days**, which would be consistent with our understanding that "promptly" currently means two days in this context. Filers do not always know ahead of time that an amendment will be necessary, so one business day would be an unnecessarily compressed timeframe. From an operational standpoint, there are many moving pieces that go into preparing a Schedule 13D amendment to ensure that the required data is assembled, accurate, and complete. This concern is compounded by the expanded definitions of beneficial ownership (to cover certain derivatives) and group under the Proposal. We are concerned that there would be many inadvertent errors if the deadline were shortened to one business day. We do not believe that such a short turnaround time is necessary to achieve the Commission's goals of transparency to other shareholders and the issuer, and any marginal

[8] Proposed Rule 13d-1(a).

[9] Proposed Rule 13d-1(e), (f), and (g).

[10] Proposed Rule 13d-2(a).

benefits from such quick reporting are substantially outweighed by the costs and burdens on investment advisers and the very real risk of mistakes. On the contrary, allowing advisers sufficient time to assess and determine whether a triggering event has occurred and to analyze, prepare, and report data with appropriate care would make it more likely that the Commission will receive information that is accurate and complete.

iii. A material change should be based on a specified percentage rather than a subjective standard.

The Commission has not proposed to amend the current materiality standard for the triggering event, which includes: "An acquisition or disposition of beneficial ownership of securities in an amount equal to **one percent** or more of the class of securities…acquisitions or dispositions of less than those amounts may be material, depending upon the **facts and circumstances**" (emphasis added).[11]

For clarity and to make it easier to set up automated protocols and systems, we suggest that the Commission take this opportunity to define the percentage ownership change that is deemed a "material change" as the specified percentage only, and that it omit the subjective "facts and circumstances" part of the standard. An explicit timeframe would set clear expectations with respect to reporting and enable advisers to program their systems to capture a triggering event. We therefore recommend revising the standard to: "An acquisition or disposition of beneficial ownership of securities in an amount equal to one percent or more of the class of securities shall be deemed 'material' for purposes of this section."

iv. Schedule 13G initial filings for QIIs and Exempt Investors should align with Form 13F deadlines (45 days after quarter end).

The Proposal would shorten the filing deadline for an initial Schedule 13G by Qualified Institutional Investors (**QIIs**) and Exempt Investors from 45 calendar days after calendar year end in which beneficial ownership exceeds 5 percent to **five business days** after the last day of the **month** in which beneficial ownership first exceeds 5 percent of a covered class.[12]

a. The confidentiality of active managers' acquisition strategies should be protected to prevent free riding and front running.

While a shorter filing deadline may make sense for Schedule 13D due to its purpose to provide information to the public and the affected issuer about rapid accumulations of its equity securities by persons who would then have the potential to change or influence control of the issuer, *Schedule 13G* filings are made by eligible filers who do not have such a control intent and should be afforded a longer filing deadline, akin to Form 13F filings.

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[11] Rule 13d-2(a).

[12] Proposed Rules 13d-1(b) and (d). Exempt investors are persons holding beneficial ownership of more than 5 percent of a covered class at the end of the calendar year, but who have not made an acquisition of beneficial ownership subject to Section 13(d) (**Exempt Investors**).

We are concerned that monthly public disclosure of securities holdings would harm investment advisers and their clients by enabling increased free riding and front running, and recommend that the Commission require quarterly reporting instead of monthly reporting. These two important concerns are especially acute for active managers, which could be disadvantaged in the event that proprietary information about their investments in which they are trying to build positions is exposed too soon to dealers and counterparties.

There is no sound policy reason for short filing deadlines where there is no concern about change of control issues. The Proposal assumes that earlier disclosure of beneficial ownership by entities that have no control intent would be highly beneficial to other shareholders without clearly articulating these benefits or how they outweigh the potential harm of earlier disclosure to other investors. We urge the Commission to consider carefully the potential negative unintended consequences of the dramatically-shortened proposed filing deadline, including increased free riding and front running.

Free riding concerns. Reports on Schedule 13G are publicly available via EDGAR. We are concerned that shortening the filing deadline could exacerbate free riding. If current beneficial ownership information becomes available on a monthly basis, other investors could capitalize on investment advisers' investment ideas by "cherry picking" in closer to near-real time the best ideas from the best-performing firms, or by replicating the acquisition strategies of high-performing advisers without paying any fee. This free riding (indeed, freeloading) would misappropriate advisers' intellectual capital and investment decision-making. This ability would benefit the free riders at the expense of the investment advisory firms that devote extensive resources to researching investments and their clients that have paid for the benefit of the advisers' expertise.

Front running concerns. We are also concerned that disclosing the beneficial ownership information required by Schedule 13G too soon after month end could reveal QIIs' and Exempt Investors' proprietary acquisition strategies and trades that are in progress, thereby enabling front running.[13] Front running is typically done by short-term traders at the expense of long-term investors. The danger of front running is especially acute while investment advisers are in the process of building or reducing a position. A shorter reporting deadline, and the resulting front-running risk, would be particularly harmful to investment advisory firms that tend to have low turnover of investments, trade in less liquid securities, or have concentrated portfolios (relatively few holdings).

Similarly, a more frequent (*e.g.*, monthly) reporting requirement would also harm other investment advisers and their clients. In the case of an investment adviser holding numerous securities that are disclosed on Schedule 13G, a more frequent reporting requirement would not only require disclosing many more reportable positions, but also would more critically expose the investment adviser's acquisition strategy. Front running would harm investment advisers'

[13] Front running can refer to a market participant taking advantage of advance knowledge of the identity of a firm that is building or exiting a position, so that it becomes more expensive for the firm to carry out its trades. We use the term here to mean trading ahead of another investment adviser in order to take advantage of advance knowledge (gathered from Schedule 13G filings) of the other investment adviser's acquisition strategies.

clients and the shareholders and investors in the funds that they manage. Investment advisers often trade "across the board,"[14] so disclosure of information on Schedule 13G would compromise all types of client and investor strategies, including institutional and individual clients, registered investment companies, private funds, and other collective investment vehicles.

To address these concerns, we recommend revising the proposed deadline for initial Schedule 13G for QIIs and Exempt Investors to 45 days after *quarter* end rather than five business days after month end.[15] A quarterly deadline significantly increases transparency for market participants as compared with the current annual deadline. Institutional investment managers are already reviewing and assessing their holdings on a quarterly basis in order to prepare Form 13F filings and are more equipped to submit accurate Schedule 13G filings with the same frequency. We believe that aligning the deadlines for initial Schedule 13G filings with Form 13F filings strikes the right balance between the Commission's concerns about information asymmetry in the marketplace, and advisers' concerns about operational strains and competitive disadvantages that would come with publicly exposing their positions more frequently.

b. Month-end filings pose operational challenges.

We are also concerned that such a drastically shorter deadline would pose significant operational challenges. Some advisers currently have a large volume of Schedule 13G filings to make after calendar year end. These can number in the hundreds. Shifting these to monthly filings would strain resources at each month end, and we do not believe that five business days after month end for QIIs and Exempt Investors is sufficient time for advisers to accurately prepare their initial Schedule 13G.

In addition to the operational challenges discussed above, the Commission should consider the balance of investment advisers' competing priorities and the Commission's and public's need for this information. During the days immediately following the end of a month, investment advisers must devote significant compliance and administrative resources to trade settlement, striking a month-end NAV, reconciling books and records with those of prime brokers, street brokers, and the administrator, preparing profit and loss statements, and conducting performance reporting, among other tasks. A monthly schedule with a short reporting deadline following month end for initial Schedule 13G would be seriously disruptive to investment advisory firms' other mandated and business-critical processes. These challenges will be severely exacerbated by the many other Commission rulemakings that involve increased reporting by advisers.[16] The Commission must consider the cumulative effect of all of these regulations on advisers' personnel and operational limitations.

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[14] Trading across the board refers to trading the same security simultaneously for a variety of different client accounts.

[15] We would oppose shortening Form 13F filing deadlines for the same reasons. Regardless, the deadlines for initial Schedule 13G filings and Form 13F filings should be aligned. We also note that there is some overlap in the securities that are reported in Form 13F and Schedule 13G.

[16] *See, e.g.*, Form PF Proposal, Adviser Cybersecurity Proposal, and Short Position Proposal.

For these reasons, we urge the Commission not to adopt the unreasonably and unnecessarily short five-business-day reporting deadline after month end proposed reporting schedule for investment advisory firms that are QIIs or Exempt Investors.

v. Schedule 13G initial filings for Passive Investors should be due in five business days rather than the proposed five calendar days.

The Proposal would shorten the filing deadline for an initial Schedule 13G in lieu of Schedule 13D by Passive Investors from 10 calendar days after acquiring beneficial ownership of more than 5 percent of a covered class to **five calendar days** after acquiring beneficial ownership of more than 5 percent.[17]

As discussed above, we recommend extending the deadline to five business days.

vi. Schedule 13G amendments should be aligned with the timing of Form 13F filings.

The Proposal would change one of the amendment *triggering events* for Schedule 13G from any change in the information previously reported to a **material change** in the information previously reported (for all Schedule 13G filers).[18] It would not change the other triggering events for filing by QIIs and Passive Investors, *i.e.*, exceeding 10 percent beneficial ownership and a subsequent more-than-5-percent increase or decrease in beneficial ownership.[19] We support the proposed change to incorporate materiality in order to balance advisers' operational and compliance burdens with the Commission's stated objectives to facilitate price discovery and reduce information asymmetry and mispricing in the market. We recommend that the Commission confirm that a change in beneficial ownership of less than 5 percent will not be deemed material for purposes of Schedule 13G amendments.

The Proposal would shorten the amendment *filing deadline* (i) for all Schedule 13G filers from 45 days after calendar year end in which any change occurred to **five business days** after the end of the **month** in which a material change occurred,[20] (ii) for QIIs, from 10 calendar days after month end in which beneficial ownership exceeded 10 percent or if subsequently there was, as of the month end, a more-than-5 percent increase or decrease in beneficial ownership to **five calendar days** after exceeding 10 percent beneficial ownership or a subsequent more-than-5 percent increase or decrease in beneficial ownership,[21] and (iii) for Passive Investors, from promptly after exceeding 10 percent beneficial ownership or a subsequent more-than-5 percent increase or decrease in beneficial ownership to **one business day** after exceeding 10 percent

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[17] Proposed Rule 13d-1(c). Passive investors are beneficial owners of more than 5 percent but less than 20 percent of a covered class who can certify under Item 10 of Schedule 13G that the subject securities were not acquired or held for the purpose or effect of changing or influencing the control of the issuer of such securities and were not acquired in connection with or as a participant in any transaction having such purpose or effect (**Passive Investors**).

[18] Proposed Rule 13d-2(b).

[19] Proposed Rules 13d-2(c) and (d).

[20] Proposed Rule 13d-2(b).

[21] Proposed Rule 13d-2(c).

beneficial ownership or a subsequent more-than-5 percent increase or decrease in beneficial ownership.[22]

We appreciate the importance of disclosure and transparency to the marketplace. However, these goals should be better balanced with the significant operational issues that would be incurred with the proposed deadlines. It takes time, for example, for a manager of a fund of funds to obtain the necessary information from underlying funds to file a Schedule 13G amendment. Securities-holdings data may also come from other third parties such as client family offices where there is limited or no automated reporting to the Schedule 13G filer. Because institutional investment managers' systems are already set up for quarterly holdings reporting on Form 13F, it would be more reasonable to adjust to a schedule of 45 days after quarter end. For the operational reasons discussed above, Schedule 13G amendments for *all Schedule 13G filers* following a material change should be aligned with the timing of Form 13F filings – *i.e.*, 45 days after quarter end.

We similarly believe that the proposed deadline for QIIs' amendments of five calendar days after the triggering event is too short. Based on experience with filing large trader amendments on Form 13H to reflect changes made during the quarter, many advisers find that even 10 calendar days (promptly after the end of the quarter) is difficult. We recommend, instead, that the deadline for QIIs' Schedule 13G amendments also be changed to 45 days after each quarter, matching the Form 13F deadline.

We also believe that the proposed deadline for Passive Investors' amendments of one business day is unnecessarily short, and recommend extending this to 10 business days. Passive Investors by definition lack control intent and certify to that effect, so the issuer's or investing public's interest in knowing changes to a Passive Investor's position sooner does not warrant the additional burden on Passive Investors. Further, Passive Investors (and QIIs) who lose eligibility to file on Schedule 13G – for example, by changing to a control intent – currently have 10 calendar days, and would have five calendar days under the proposed amendments, to file their initial Schedule 13D reflecting this change in intent. It seems inconsistent with the materiality of the information disclosed to require Passive Investors who remain passive to file a Schedule 13G amendment in a shorter timeline than formerly-Passive Investors who have to file a Schedule 13D.

vii. We support extending the "cut-off" time from 5:30 pm to 10:00 pm.

We agree with updating the filing cut-off time for Schedules 13D and 13G initial and amended filings from 5:30 pm ET to 10:00 pm ET.[23] This would conform to the Section 16 filing deadlines and help ease the compliance burdens of shortened filing deadlines and time zone differences.

[22] Proposed Rule 13d-2(d).

[23] Rules 13(a)(2) and 13(a)(4) of Regulation S-T. We recommend extending EDGAR filer support hours to match the extended deadline.

We do not object to making a temporary hardship exemption unavailable to Schedules 13D and 13G filers as long as a filer may request a filing date adjustment under Rule 13(b) of Regulation S-T if it experiences unanticipated technical difficulties that prevent the timely submission of an electronic filing, as noted in the Proposal.[24]

II. Treatment of Cash-Settled Derivatives

The Commission is proposing to deem a holder of a cash-settled derivative security "[t]hat is held with the purpose *or effect* of changing or influencing the control of the issuer of such class of equity securities, *or in connection with or as a participant in any transaction having such purpose or effect*" to beneficially own the reference securities just as if they held such securities directly.[25] According to the Proposal, this is because holders of such derivative securities may have both the incentive and ability to influence or control the issuer of the reference securities under certain circumstances. We oppose this proposal as it is unnecessary, inconsistent with the purpose behind beneficial ownership reporting, and overly complicated.

i. It is unnecessary to include cash-settled derivatives in determining beneficial ownership.

We support the Commission's interest in preventing the evasion of Section 13(d) or (g) of the Exchange Act by a holder of cash-settled derivative securities through its counterparty relationships. However, current Rule 13d-3(b) already effectively prevents such evasion, by requiring "[a]ny person who, directly or indirectly, creates or uses a trust, proxy, power of attorney, pooling arrangement or any other contract, arrangement, or device with the purpose of effect of divesting such person of beneficial ownership of a security or preventing the vesting of such beneficial ownership as part of a plan or scheme to evade the reporting requirements of section 13(d) or (g) of the Act" to be a beneficial owner of such security. This Rule has been used to confer beneficial ownership to the holder of a cash-settled derivative security in the exact type of situation about which the Commission expresses concern in the Proposal – *i.e.*, where holders of derivative securities may exercise influence over the counterparty's voting and/or investment decisions with respect to the underlying securities that it may use to hedge the position.[26] As such, it seems unnecessary to adopt an explicit requirement to include all cash-settled derivatives in a person's beneficial ownership, if held with a control purpose or effect, when current Rule 13d-3(b) already captures the situation where the holder of such a derivative security is engaging in a scheme to evade beneficial ownership reporting.

The Commission has previously adopted a rulemaking that provides guidance on when a holder of a security-based swap should be deemed the beneficial owner of the underlying security.[27] Instead of adopting proposed Rule 13d-3(e), we believe that the Commission should

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[24] *See* Proposal at 13859.

[25] Proposed Rule 13d-3(e) (emphasis added); Proposal at 13860.

[26] *See, e.g., CSX Corp. v. Children's Inv. Fund Mgmt. (UK) LLP*, 562 F. Supp. 2d 511 (S.D.N.Y. 2008), *remanded on different grounds*, 654 F.3d 276 (2d Cir 2011), *then voluntarily dismissed*.

[27] *See Beneficial Ownership Reporting Requirements and Security-Based Swaps*, 76 Fed. Reg. 34579 (June 14, 2011), available at https://www.sec.gov/rules/final/2011/34-64628fr.pdf (**2011 Release**).

publish clarifying guidance explaining that the beneficial ownership determination for all cash-settled derivatives is consistent with the treatment of security-based swaps, as described in the 2011 Release.

ii. The proposed test is unclear.

The Commission has proposed as an element of the definition of beneficial ownership that a person who holds a cash-settled derivative security[28] is deemed the beneficial owner of the reference equity security if the derivative security is "held with the purpose or effect of changing or influencing the control of the issuer of such class of equity securities, or in connection with or as a participant in any transaction having such purpose or effect."[29] We believe that this proposed test is unclear. A basic tenet of a cash-settled derivative security is that it affords the holder no ownership, investment rights, or voting rights in connection with the reference security, and, without those rights, it is difficult to see how the holder can influence the control of the issuer and it is not clear how the Commission would apply this element. As discussed above, we believe it would be better for the Commission to follow the guidance on beneficial ownership that it follows for security-based swaps.

iii. Inclusion of cash-settled derivatives in beneficial ownership is inconsistent with the purpose behind the beneficial ownership reporting regime.

To the extent that a holder of a derivative security has only a purely economic interest in the underlying class of an issuer's securities through the derivative security – and the issuer's securities are merely used as a reference security – we do not believe that this economic exposure, without more, should be deemed to confer voting or investment power over the underlying reference securities. Such an expansion of the definition of beneficial ownership in proposed Rule 13d-3(e) would defy the concept of beneficial ownership as originally intended and as currently defined in Rule 13d-3. The current definition in Rule 13d-3 – *i.e.*, securities over which a person exercises voting or investment power, or has the right to acquire such power within 60 days (if passive) or at any time (if held with a control purpose or effect) – is directly and reasonably related to the purpose behind the reporting regime, namely, to provide information to the public about stock accumulation by persons who could effect or influence control of the issuer.[30] The proposed expansion in proposed Rule 13d-3(e) would go beyond the intended purpose of reporting beneficial ownership of equity securities. This could result in potential and significant overreporting by advisers, leading to unfounded inferences from public filings that holders of cash-settled derivatives may have voting and investment power over securities that they do not, in fact, have, nor do they have the right to acquire.

This is analogous to the discussion in the Proposal in which the Commission acknowledges that persons who hold short positions have no capacity to vote or dispose of a

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[28] As discussed below, we agree that a "derivative security" should not include security-based swaps for purposes of determining beneficial ownership.

[29] Proposed Rule 13d-3(e)(1)(i)C.

[30] *See* Proposal at 13850, n.24, citing H.R. Rep. No. 90-1711 (1968) and *Filing and Disclosure Requirements Relating to Beneficial Ownership*, 45 Fed. Reg. 81556 (Dec. 11, 1980).

covered class and thus are beyond the scope of Sections 13(d) and 13(g) and Regulation 13D-G (except for disclosure of short sale activity). Holders of cash-settled derivative securities similarly "have no [ ] capacity to vote or dispose of a covered class"[31] and, accordingly, ownership of such derivative securities should also be beyond the scope of Sections 13(d) and 13(g).

iv. Inclusion of cash-settled derivatives in the definition of beneficial ownership is inconsistent with treatment of security-based swaps and could lead to confusion.

By re-adopting the definition of beneficial ownership in Rules 13d-3 and 16a-1 to explicitly apply to security-based swaps in the 2011 Release, the SEC ensured that treatment of such derivative securities would be consistent with the existing definition of beneficial ownership in Rule 13d-3 – namely that beneficial ownership is demonstrated by being able to exercise voting or investment power over the underlying reference securities or being able to acquire the underlying reference securities within 60 days (if passive), or at any time (if held with a control purpose or effect).

We recognize, as the Proposal points out, that there may be narrow circumstances in which a holder of a security-based swap could be deemed the beneficial owner of the underlying securities under current Rule 13d-3. These potentially include situations in which the swap is **not** exclusively settled in cash, the holder can direct the counterparty how to vote or dispose of the reference security, or the holder uses the swap as part of a plan or scheme to evade beneficial ownership reporting.[32] We believe that the proposed inclusion within the scope of beneficial ownership in the Proposal of all cash-settled derivatives (other than security-based swaps) is inconsistent with this existing guidance on cash-settled security-based swaps. This inconsistency would likely create confusion for firms trying to monitor their beneficial ownership reporting obligations and, in our view, cause a significant amount of over reporting. We believe that guidance from the Commission that clarifies that the approach to beneficial ownership under the 2011 Release will be the same for all cash-settled derivatives would sufficiently address the Commission's concerns about potential evasion, without creating a very broad, inconsistent, and confusing standard for cash-settled derivatives exclusive of security-based swaps.

v. It would be difficult to determine control intent of cash-settled derivative securities.

The proposed circumstances in which a holder acquires or holds a cash-settled derivative security with the purpose or effect of changing or influencing the control of the issuer are not reasonably determinable. Because any link to beneficial ownership is so attenuated in the case of holders of cash-settled derivatives, it would be extremely difficult, based on investments in derivative securities alone, for an investment adviser – or Commission staff – to determine when a holder has an intent to influence or control the issuer, thereby deeming the person a beneficial owner of the issuer's equity security. To the extent the Commission determines to subject cash-

[31] Proposal at 13863, n.108.

[32] See Proposal at 13879, n.198.

settled derivatives to Schedules 13D and 13G reporting, consistent with proposed Rule 13d-3(e), it would be helpful if the Commission provided further guidance on this point, including to determine when the holder has a control intent purely by holding a cash-settled derivative security, in order to help prevent both under and over reporting.

vi. The formula for calculating the number of equity securities that a holder of a cash-settled derivative will be deemed to beneficially own is overly complicated and difficult to track.

We are concerned that it would be a significant operational undertaking to build systems to track beneficial ownership of cash-settled derivative securities, as proposed. Because derivatives may not always have a perfect one-to-one relationship to the reference security, the Proposal would set forth the formula for calculating the number of equity securities that a holder of a cash-settled derivative will be deemed to beneficially own.[33] The value of the derivative security may change at a multiple or fraction to any change in value of the reference security. This difference in the amount by which the value of a derivative security changes as compared to the amount by which the value of the reference security changes is referred to as the delta.[34] The calculation also requires daily re-computation, and the resulting value can fluctuate on a daily basis. Further, the calculation applies only to non-security-based-swap cash-settled derivative securities, and it may be difficult to ascertain what characteristics define a swap versus a non-swap.

We believe that calculating beneficial ownership according to the proposed formula,[35] and keeping track of that calculation on a *daily* basis, would be very challenging. This is not how calculations are currently performed, so systems would need to be built to get the needed information, incorporate the information into the system, and aggregate the information for beneficial ownership purposes. As a result, it would be extremely complicated to calculate beneficial ownership that includes holdings of non-security-based-swap cash-settled derivative securities and determine when the 5 percent threshold has been crossed. This concern is compounded by the very short proposed five-calendar-day filing deadlines for Schedule 13D.

III. Disclosure Requirements Regarding Derivative Securities (13D)

The Commission is proposing to amend Schedule 13D to remove any ambiguity and make clear that a person must disclose interests in all derivative securities that use a covered class as a reference security.[36] These include derivatives not originating with the issuer, such as

[33] Proposed Rule 13d-3(e)(2).

[34] Proposal at 13863.

[35] The number of securities that a holder of such derivative security will be deemed to beneficially own is proposed to be the larger of two calculations: the product of (x) the number of securities by reference to which the amount payable under the derivative security is determined multiplied by (y) the delta of the derivative security; or (x) dividing the notional amount of the derivative security by the most recent closing market price of the reference equity security, and then (y) multiplying such quotient by the delta of the derivative security. Proposed Rule 13d-3(e)(2)(i)(B).

[36] Proposed amendments to Item 6 of Schedule 13D.

cash-settled options not offered or sold by the issuer and security-based swaps. While the Commission is, in our view, appropriately excluding security-based swaps from the calculations of beneficial ownership described above, the Commission proposes to include security-based swaps in those contracts, arrangements, understandings, or relationships that need to be disclosed in Item 6 of Schedule 13D.

Item 6 requires beneficial owners to "[d]escribe any contracts, arrangements, understandings or relationships (legal or otherwise) among the persons named in Item 2 [of Schedule 13D] and between such persons and any person with respect to any securities of the issuer" and sets forth a non-exclusive list of examples of such contracts, arrangements, understandings, or relationships.

According to the Proposal, because cash-settled derivative securities were not expressly included among these examples, questions may arise as to whether beneficial owners should report contracts, arrangements, understandings or relationships with respect to an issuer's securities given that (i) only a purely economic, but no legal, interest is held through such derivatives in any class of an issuer's securities and (ii) the issuer's securities are only used as a reference security. The Commission is concerned that the current requirement could be interpreted as excluding the use of cash-settled options not offered or sold by the issuer, or other derivatives not originating with the issuer, including other cash-settled derivatives such as security-based swaps.

While we support eliminating ambiguity and reducing confusion regarding disclosure obligations in Schedule 13D, we believe that the Proposal to include security-based swaps in Item 6 (to the extent they use the issuer's equity security as a reference security) would add to, rather than eliminate, ambiguity. Because security-based swaps are excluded from the calculation of beneficial ownership discussed above, and because the Commission has proposed to require disclosure of security-based swap positions in a separate rulemaking,[37] we believe that the Commission should not require disclosure of security-based swap arrangements in Item 6. Not only would this be confusing, but we do not believe such disclosure would serve any additional purpose.

Further, Schedule 10B, proposed in the Security-Based Swaps Proposal for reporting security-based swap positions, would not require identification of the swap counterparty. Yet the instruction to Item 6 requires "naming the persons with whom such contracts, arrangements, understandings, or relationships have been entered into."[38] As such, requiring disclosure of security-based swap arrangements in Item 6 would negate the benefits to these holders of non-disclosure of counterparties proposed in Schedule 10B. Moreover, from an operational standpoint, determining which type of derivative security to include in different parts of the form – no security-based swaps in the beneficial ownership calculation but security-based swaps in

[37] *See* Security-Based Swaps Proposal.

[38] Rule 13d-101, Item 6.

Item 6 – would be a logistical challenge. We therefore oppose requiring disclosure of contracts, arrangements, understandings, or relationships involving security-based swaps under Item 6.

IV. Definition of a Group

The Commission is proposing several amendments related to persons who are deemed to act as a group. These include, among other changes, (i) specifying that advance disclosure of a Schedule 13D filing to another person who subsequently acquires those securities will be deemed to have formed a group and (ii) specifying that when two or more persons act as a group, even without an implied or express agreement, a group will be deemed formed and to have become the beneficial owner of the beneficial ownership held by its members.[39]

i. The expansion of the definition of a group is overbroad.

We understand the Commission's interest in protecting against the evasion of disclosure requirements by persons who collectively seek to change or influence control of an issuer yet who each acquired and hold an amount of beneficial ownership at or just below the reporting threshold. However, in our view, the proposed definition is problematic because it removes the condition of an express or implied agreement in favor of a strict liability standard. We believe that it would be unfair to be deemed part of a group – and restricted from buying shares – just because a third party told an adviser that it was going to file a Schedule 13D, without any express or implied intent by the parties to form a group. Disclosure of this information may be outside of the adviser's control and have had no input or expression of approval from the adviser. The adviser may also have independently determined to acquire or even continue to hold the same securities.

Similarly, removing the explicit requirement that there be an agreement among group members increases the potential for circumstantial evidence to be used to deem a group formed when there was no actual meeting of the minds among the security holders. These revised circumstances under which a group may be deemed formed are simply too open-ended and may lead to many advisers inadvertently becoming part of a group. At a bare minimum, we believe that some type of agreement, whether express or implied, should be present before two or more persons are deemed a group, so that an adviser is not unwittingly deemed to be part of a group. We strongly urge the Commission to reconsider the definition of a group, and recommend setting forth clearer parameters on what constitutes a group, such as an express or implied contract or agreement to act in concert.

ii. Exemptions for "groups" should be extended to other common communications.

We appreciate that the Commission is proposing two new exemptions from Sections 13(d) and (g) under which two or more persons may (i) communicate and consult with one another and engage with an issuer without being deemed a group[40] and (ii) enter into an

[39] Proposed Rule 13d-5.

[40] Proposed Rule 13d-6(c).

agreement governing a derivative security in the ordinary course of business without being deemed a group.[41] We support providing greater certainty regarding the application of the group rules, which will help alleviate the potential for a chilling effect on shareholder communications or engagement or impairing the execution of commercial transactions in the ordinary course of business.

We do not believe that the proposed exemptions go far enough and are concerned that few advisers would be able to rely on them, particularly if the Commission adopts an overbroad definition of a group as proposed. Towards that end, we are concerned that an adviser could still be pulled into being deemed a group if it has other common communications. For example, the Proposal could have a serious chilling effect on investors consulting with one another or partaking in productive engagement with an issuer's management on corporate policy matters, such as those involving environmental, social, and governance (**ESG**) issues, to hold management accountable or pursue sustainability initiatives. We believe that the definition of who is deemed to be a group should be more clearly defined to provide assurance that these and other types of unobjectionable communications do not trigger group status.

V. Structured Data Requirement

Provided that filers are given sufficient time to implement and test the systems requirements, we support the proposal to replace the current HTML or ASCII requirement and instead require that all disclosures, including quantitative disclosures, textual narratives, and identification checkboxes, except for the exhibits to the Schedules, be filed using a structured, machine-readable, XML-based data language specific to Schedules 13D and 13G (13D/G-specific XML).

VI. Implications of the Proposed Amendments on Section 16

Exchange Act Section 16(b) is intended to prevent insiders and 10 percent beneficial owners of an issuer from making short-swing profits from buying and selling shares of the issuer within a period of less than six months. Insiders face strict liability for violations, which the corporation and its shareholders may enforce. The purpose of Section 16 is thus very different from that of Section 13(d), which is intended to signal to the public an intent to change or influence the control of an issuer. We urge the Commission to continue to keep these two reporting regimes distinct from each other.

The Proposal notes that the proposed amendments to Rules 13d-3, 13d-5, and 13d-6 would directly impact the analysis under Rule 16a-1(a)(1) as to whether a person is a 10 percent holder.[42] To the extent the revised definition of beneficial ownership as set forth in the Proposal is adopted, we do not think it would be appropriate to apply the revised standards of Regulation

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[41] Proposed Rule 13d-6(d).

[42] Proposal at 13876.

13D-G to identify insiders subject to Section 16 and we recommend keeping the analysis separate.

Moreover, we are concerned that broadening the definition of beneficial ownership for purposes of Section 16 would expand potential Section 16(b) short-swing profit liability significantly by making it easier to reach 10 percent beneficial ownership. For example, under Section 16, any member of a group that beneficially owns more than 10 percent in the aggregate becomes subject to Section 16; accordingly, the expansive proposed amendment to the definition of group would cause a number of advisers to – possibly inadvertently – become subject to Section 16 and likely result in significant increases in short-swing profit liability for – perhaps unknowingly – trading while subject to Section 16.

Similarly, if cash-settled derivative securities are included in calculating the 10 percent threshold for purposes of Section 16, persons may be deemed insiders subject to short-swing profit liability for transactions on all equity securities of the subject issuer – including derivatives – even though such person does not have voting or investment power over more than 10 percent of the voting securities of the issuer. If the Commission's intent is disclosure, that can be satisfied under Section 13. We do not believe that beneficial owners for purposes of Section 13(d) should be subject to Section 16(b) liability unless they independently become insiders for purposes of Section 16 under the existing definition of beneficial ownership.

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We appreciate the Commission's consideration of our comments on the Proposal and would be happy to provide any additional information that may be helpful. Please contact the undersigned or Associate General Counsel Laura Grossman at (202) 293-4222 if we can be of further assistance.

Respectfully,

/s/ Gail C. Bernstein

Gail C. Bernstein
General Counsel

cc: The Honorable Gary Gensler, Chair
The Honorable Hester M. Peirce, Commissioner
The Honorable Allison Herren Lee, Commissioner
The Honorable Caroline A. Crenshaw, Commissioner
William A. Birdthistle, Director, Division of Investment Management
Renee Jones, Director, Division of Corporation Finance

Appendix A

Filing Schedule

Filing	Current Schedule	Proposed Schedule	IAA's Recommended Schedule
Schedule 13D Initial	10 calendar days	5 calendar days	5 business days
Schedule 13D Amendment	"Promptly" after the triggering event	1 business day	2 business days
Schedule 13G Initial *QIIs and Exempt Investors*	45 calendar days after calendar year end	5 business days after month end	45 calendar days after quarter end
Schedule 13G Initial *Passive Investors*	10 calendar days	5 calendar days	5 business days
Schedule 13G Amendment *All Schedule 13G Filers*	45 calendar days after calendar year end	5 business days after month-end in which a material change occurred	45 calendar days after quarter end
Schedule 13G Amendment *QIIs*	10 calendar days after month end of trigger	5 calendar days after beneficial ownership exceeds 10% or 5% increase/decrease	45 calendar days after quarter end
Schedule 13G Amendment *Passive Investors*	"Promptly" after triggering event	1 business day after beneficial ownership exceeds 10% or 5% increase/decrease	10 business days